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Questions and Answers-Copyright Column-What happens when a faculty member donates a personal subscription to the library?

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Fair Use Defense

This of course leads to that four element analysis and the task of weighing them together.

Purpose of the use - parody. The Act permits comment, and parody is a form of comment. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Parody mimics "an original to make its point, and so has some claim to use the creation of its victim's ... imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." *Id.* at 580-81.

Well, I'd certainly never thought of that before. But then I wasn't an English major.

The parodic character of the work must "reasonably be perceived" without, however, the courts trying to judge whether the attempt at humor succeeded. *Id.* at 580. But must parody seek comic effect and ridicule, or is there a broader definition of commenting upon and criticizing a prior work? The Eleventh Circuit found no adequate guidance in *Campbell* and chose the broader approach.

N23 is pretty interesting here, quoting Michiko Kakutani's review of TWDG in the *New York Times* saying the work is "decidedly unfunny." To which Houghton Mifflin replies that it's "African-American humor" and non-African-American judges can't evaluate it. The Court kind of coughs behind it's hand at this notion of a subjective inquiry and says it doesn't matter because parody doesn't have to be funny. Which is where TWDG slides by under Fair Use. TWDG is not a commentary on slavery and the South which might shade over into satire, but a specific attack on GWTW.

Once again now, Purpose of the Use. Well it's commercial of course. But this can be overshadowed by a strong transformative use of GWTW. "The goal of copyright, to promote science and the arts is generally furthered by the creation of transformative works." *Id.* at 579.

Well Randall sure does that. Ashley Wilkes is gay. Scarlett has black blood. Rhett Butler dumps Scarlett for Cynara, the black narrator and ends up ruined. And this, in the language of *Campbell* provides "social benefit, by shedding light on an earlier work, and, in the process, creating a new one." *Id.*

Nature of the Work. In the hierarchy of values, original works get greater protection than derivative ones. But parody is always going to feed off famous original works.

Amount Used. "[P]arody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation ... When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." *Id.* at 588.

Houghton Mifflin argued that each of the characters lifted from GWTW represented an Old South stereotype that had to be shown first in the original before they could be shattered. SunTrust said TWDG took way too much —

far more than necessary for commentary. TWDG includes lots of petty detail from GWTW. The Tarleton twins have red hair. Melanie is flat-chested. Bonnie wears a blue-velvet riding habit.

Campbell holds that a parodist need not be restricted to taking a bare minimum. "Parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point ... Even more extensive use [than necessary to conjure up the original] would still be fair use, provided the parody builds upon the original, using the commentary." *Elsmere Music, Inc. v. National Broad'g Co.*, 623 F.2d 252, 253 n. 1 (2d Cir. 1980).

Viz, it's okay to go over the line if TWDG doesn't provide a market substitute for GWTW. *Campbell*, 510 U.S. at 588.

SunTrust argued Houghton Mifflin labeled TWDG a parody as a legalistic afterthought. *Campbell* warned courts to "ensure that not just any commercial takeoff is rationalized post hoc as a parody." *Id.* at 600. The Eleventh Circuit said this was taken care of by the market effect analysis.

Effect on the Market Value of the Original. Here market harm is looked at and the "what if everyone did it" question considered.

SunTrust has authorized a second derivative work and St. Martin's paid "well into seven figures" for it.

So how much is "well into"? Five million? Four?


But that doesn't address the question of whether TWDG supplants GWTW. And the Court reasoned there wasn't much likelihood of that. The two groups of fans don't have a whole lot of overlap, and an anti-Gone With the Wind screed won't be bought by those folks who meet in convention motels in antebellum costumes.

And Some Final Thoughts on Parody.

"Parodies and caricatures ... are the most penetrating of criticisms." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (quoting Aldous Huxley, *Point Counter Point*, ch. 13 (1928)).

"The parody is the last refuge of the frustrated writer. Parodies are what you write when you are associate editor of the *Harvard Lampoon*. The greater the work of literature, the easier the parody. The step up from writing parodies is writing on the wall above the urinal." Paul Hirshson, "Names and Faces," *The Boston Globe*, July 22, 1989 at 7 (quoting Ernest Hemingway).

Which is really amusing when you consider that Hemingway's The Torrents of Spring was a savage and vindictive parody of his mentor Sherwood Anderson's Dark Laughter.

How's that for someone who wasn't an English major? 

Questions & Answers — Copyright Column

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QUESTION: *The price difference between institutional and individual subscription rates for many expensive biomedical journals is extraordinary. Sometimes a faculty member wants to donate a personal subscription to the library since it cannot afford the more costly institutional subscription. Is there a problem with accepting the gift subscription and adding the journal to the library collection? (This question was answered in the column for September, 2000, but I have been asked to address it again.)*

ANSWER: Historically, journal subscriptions had just one price for subscribers, but this began to change after the photocopier became ubiquitous in libraries. Some publishers recognized that the use a library subscription received was quite different from that an individual subscription typically received. When an individual subscribes to a journal, the assumption is that only that one person or a very small number of users will read that copy of the journal.

Institutional copies, however, have multiple users and the number probably is greater for the more expensive journals. For years publishers even said that institutional subscriptions

permitted multiple users and some photocopying. In recent years, publishers have downplayed the latter, and in the *Texaco* decision, the Second Circuit U.S. Court of Appeals, held that even institutional subscriptions do not insulate a company from paying royalties for in-house copying. This case applied only to profit-seeking organizations, however.

So, what happens when a faculty member donates a personal subscription to the library? Clearly, publishers expect libraries to pay the higher institutional rate if that journal is to be added to the collection and used as if it were an institutional subscription. Is it fair to treat a gift personal subscription as if it were purchased at the library rate? Probably not. Is it copyright infringement? The issue has never been litigated and arguably the first sale doctrine permits the faculty member to donate the subscription to the library.

Here are some issues to consider: (1) Did the faculty member agree to a single user license when he subscribed to the journal? (2) Did she agree not to donate the journal in the license agreement? (3) How can the library be sure that use of the faculty member

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subscription as the library's only copy does not infringe copyright or a license agreement? (4) Does the library already subscribe to the journal (under the institutional rate) so that the donated subscription is simply a back up for missing issues for binding?

If the answers to these questions causes any concern, then one can always consult the publisher. Because there is no really clear answer to this question, here is my best advice. Accept those journal subscriptions only as back up or for general reading areas but do not add them to the library collection as if it were purchased at the institutional rate.

QUESTION: *My library owns a photograph of a building in town that is on the Historic Register, but it is unclear when the photograph was taken. The library wants to crop the photo to include only the front façade of the building, colorize the photograph and remove the automobiles that are parked in front so that we can use the photo as a part of the design for a library Website that deals with the architectural treasures of the town. If the library owns the photograph is there any problem with this?*

ANSWER: It may be a problem depending on whether the library actually owns the copyright or just the copy of the photograph. When photographs are donated to a library, seldom are they donated by the copyright

owner, i.e., the photographer or the photographer's heirs. Only the copyright owner can even transfer the copyright to library. So, assuming that the library does not hold the copyright, then it must determine the copyright status of the work. If the photograph was ever published, then it is relatively easy to determine whether the work is still protected by copyright; if it has never been published, then the focus must be on the life of the photographer, plus 70 years or the end of 2002, whichever comes first.

Assume that the work is unpublished or is still protected by copyright. Altering a copyrighted work without permission from the copyright holder infringes the owner's exclusive right of adaptation. On the other hand, the photograph may be so old that the library is not very worried about the copyright holder complaining. If the library is willing to assume the risk, then adapting the photograph and reproducing it on the Webpage can be done.

QUESTION: *The library has a number of CDs under a single user license. In order to make it easier for users, the library would like to load the software on several computers throughout the library. Since a user has to insert the CD in the computer in order to access it, only one user at a time can actually use the CD. Is there any problem with doing this?*

ANSWER: Certainly, loading the CD software on multiple computers makes sense from the library perspective since it makes it easier for a user, but it does not from a copyright per-

spective. Making multiple copies of the software infringes the reproduction right in the software. Even asking the CD-ROM publisher for permission to copy the software is unlikely to work. Few CD-ROM producers actually own the copyright in the software that is embedded on the CD. The CD producer actually purchases one copy of the software from the software producer and embeds it on the CD. So, permission to make multiple copies of the software must be sought from the owner of the copyright in the software.

QUESTION: *A nurse educator asked the library to obtain a copy of an article for her through interlibrary loan. The library obtained the copy and delivered it to her. The faculty member then asked the departmental secretary to make 20 copies of the article to distribute to nursing managers. What should the librarian do about this?*

ANSWER: The responsibility of the librarian is actually quite limited under the Copyright Act. Under Section 108(d)(2), the librarian is permitted to obtain a copy of an article for the faculty member via ILL but only if the library has no knowledge that the copy will be used for other than fair use copies. Making multiple copies as described in the question is unlikely to be fair use, but the librarian did not know of this intended use until after the copies were made.

If the desire is to protect the institution, then the librarian may want to determine what the royalties would be for the 19 copies and tell the faculty member and her supervisor. 